



## WISCONSIN DEPARTMENT OF NATURAL RESOURCES NOTICE OF FINAL GUIDANCE & CERTIFICATION

*Pursuant to ch. 227, Wis. Stats., the Wisconsin Department of Natural Resources has finalized and hereby certifies the following guidance document.*

**DOCUMENT ID WT-19-0033**

**DOCUMENT TITLE REVIEW OF WETLANDS ON DORMANT DEVELOPMENT SITES.**

**PROGRAM/BUREAU WATERWAYS PROGRAM**

**STATUTORY AUTHORITY OR LEGAL CITATION WIS STAT 281**

**DATE SENT TO LEGISLATIVE REFERENCE BUREAU (FOR PUBLIC COMMENTS) 9/9/19**

**DATE FINALIZED 10/21/19**

### DNR CERTIFICATION

*I have reviewed this guidance document or proposed guidance document and I certify that it complies with sections 227.10 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or a rule that has been lawfully promulgated. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes.*

A handwritten signature in black ink, appearing to read 'Michael C. [unclear]'.

10/11/19

Signature

Date

The attached guidance, "**Review of Wetlands on Dormant Development Sites**", was developed for use by Department staff in the Bureau of Watershed Management when assessing how to review dormant development sites with wetlands that had not been previously identified.

The regulation of wetlands can be found under Wisconsin Statutes Chapter 281.36. These wetland regulations are applicable to proposed activities that will result in a discharge of dredged or fill material into wetlands. This guidance is applicable to sites where development activities began, but then stopped due to a downturn in the economy that began in approximately 2008, and jurisdictional wetlands have re-established or expanded in areas that had not been previously identified as wetland.

## Review of Wetlands on Dormant Development Sites

WW-2016-008



Watershed Management  
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### Description:

This guidance provides sideboards the Department staff shall utilize when jurisdictional wetlands are proposed to be impacted on dormant development sites, in other words sites where development activities began, but were halted due to the recent economic recession, that occurred between January 1<sup>st</sup>, 2008 and December 31<sup>st</sup>, 2009.<sup>1</sup> A dormant development site, as described in this guidance, meets all of the following circumstances:

- A wetland delineation was completed for a proposed development and the delineation was done by an assured delineator, received WDNR or US Army Corps of Engineers (ACOE) concurrence
- The proposed development was commenced during the economic recession but not completed within five years of the original wetland delineation.
- The proposed development plan was based on a delineation completed no earlier than 2003.
- There is renewed interest in the development of the site, and a new wetland delineation shows wetlands on the project site that were not present in the previous delineation.

This guidance applies to the state wetland regulatory process only. Projects may also need to obtain other state permits or permits from county, local or federal agencies.

### Need:

A wetland permit is required from the Department to placed dredged or fill material into a wetland under Wis. Stats. s. 281.36. The permit process requires an evaluation by the Department of practicable alternatives under Wis. Stats. ss. 281.36(3g)(h)1. and (3m)(b). The practicable alternatives analysis evaluates alternatives to avoid wetland impacts and alternatives to minimize wetland impacts. If the wetlands cannot be avoided by the proposed project, but the impacts have been minimized, the Department then must assess the significance of the environmental impact as a result of the project, before the Department may issue the permit.

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<sup>1</sup> "When did it end?" The Economist. April 15<sup>th</sup>, 2010. at <http://www.economist.com/node/15911334>

There are many cases where development activities began but stopped. Had those development projects been able to finish, the sites would be completely developed in compliance with the law.

Because so much time has gone by since the start of the recession, any sites where development efforts have been renewed and wetland delineations are more than five years old, have to go through another delineation process to evaluate site conditions for the presence of regulated wetlands. Some of this occurred as a result of previous clearing, grubbing and/or partial construction activities. In other places, farming activities that had previously suppressed wetland characteristics were no longer occurring, thereby allowing some wetlands to re-establish themselves. These are unique situations that require a focused and consistent process so the public can provide the right information to DNR the first time and DNR staff understand the logistics and barriers associated with renewing development in dormant sites.

## **Statutory Provision:**

### **s. 281.36 Permits for discharges into wetlands; mitigation.**

#### **(3b) PERMIT REQUIRED.**

**(a)** For purposes of this section, a wetland general or individual permit issued by the department constitutes water quality certification as required by 33 USC 1341 (a).

**(b)** No person may discharge dredged material or fill material into a wetland unless the discharge is authorized by a wetland general permit or individual permit issued by the department under this section or the discharge is exempt under sub. (4). No person may violate any condition contained in a wetland general or individual permit issued by the department under this section. The department may not issue a wetland general or individual permit under this section unless it determines that the discharge authorized pursuant to the wetland general or individual permit will comply with all applicable water quality standards.

## **Implementation:**

The review process for these dormant development sites shall be as follows:

1. The project proponent submits the new delineation for concurrence to DNR along with the original delineation.
2. Staff shall review the wetland delineations to identify whether any of the newly identified areas meet the state definition of a wetland. Staff shall utilize the 1987 edition of the ACOE Wetland Delineation Manual and any other documents developed by the ACOE to interpret that manual, as required under Wis. Stats. s. 281.36(2m). If newly identified areas do not meet the definition of a wetland, then these areas do not fall within the Department's jurisdiction under Wis. Stats. s. 281.36.
3. Staff shall review the wetland delineations and determine whether or not any of the newly identified areas are landscape features identified as artificial wetlands in Wis. Admin. Code Ch. NR 103.06(4). If the newly identified areas are landscape features that

fall within Wis. Admin. Code Ch. NR 103.06(4), these areas do not fall within the Department's jurisdiction under s. 281.36.

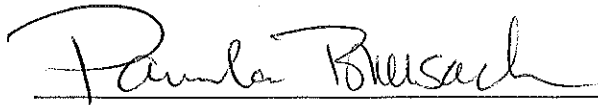
4. The department shall presume that for those newly identified wetland areas there are limited practicable alternatives if any of the following conditions are documented in the permit application:
  - a. If the developer or municipality has installed sewer, water, other utilities or roads to facilitate planned development it is presumed that there are no practicable alternatives to avoiding an impact to the newly delineated wetlands if the infrastructure was installed based on a municipal approval or municipal-approved plat.
  - b. If the developer has undertaken significant site preparation work including clearing, grubbing<sup>2</sup> and rough site grading, or otherwise significantly altered site topography or drainage patterns, it is presumed that there are no practicable alternatives to avoiding an impact to the newly delineated wetlands.
  - c. If the developer has an approved plat, sold at least 20% of the lots or the lot areas to third parties, and had a previous delineation and wetland permits if necessary prior to obtaining a new delineation that identified additional areas of wetlands, it is presumed that there are no practicable alternatives to avoiding an impact to the newly delineated wetlands.

Note: If the ACOE assumes jurisdiction over the newly delineated areas and requires the applicant obtain approval under Section 404 of the Clean Water Act, the ACOE may require the applicant to consider other avoidance and minimization alternatives.

## Conclusion

The Department is encountering a number of cases where developments were designed to avoid or minimize impacts to the delineated wetlands and construction started, but development of the site was never completed due to the economic recession. These dormant developments, would have been compliance with the State wetland regulations had those sites been fully developed at that time construction was initiated. However, enough time has passed that new wetland delineations are necessary and additional areas may be delineated. When interest is renewed in a dormant site where wetlands were previously evaluated, proposed impacts were authorized, and development activities such as clearing and grubbing, cutting and filling and/or infrastructure placement began and it is generally impracticable to expect that impacts to wetlands can be completely avoided.

Approved:



Pamela Biersach, Bureau Director, Watershed Management

7-27-16  
Date

**Contact (608) 261-8447 or [pamela.biersach@wisconsin.gov](mailto:pamela.biersach@wisconsin.gov) for further information.**

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